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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, ET AL.,
Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., and FRANKLIN NATIONAL BANK,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

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and Lefrak Kew Gardens Corp.

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MEMORANDUM OPPOSING CERTIORARI

Respondents Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp. ("Lefrak") submit this memorandum in opposition to the petition for a writ of certiorari to review a judgment and opinion of the Court of Appeals of the State of New York, entered in this proceeding on May 3, 1973. Respondents Lefrak contend that the petition, filed on August 17, 1973 and more than 90 days since the entry of the aforesaid judgment, was not timely filed and, therefore, is jurisdictionally defective.

1. The above-entitled action arises from separate proceedings commenced by Respondents Lefrak and Franklin National Bank ("Franklin"), pursuant to Article 78 of the New York Civil Practice Law and Rules, to review and set aside resolutions of the Board of Standards and Appeals of

the City of New York ("The Board"), rendered on February 10, 1972, which denied applications by Lefrak and Franklin for a further extension of previously issued building permits so as to allow continued construction of two apartment buildings in the Forest Hills-Kew Gardens area of Queens County, New York.

By decision rendered December 26, 1972 and order entered thereon, the Appellate Division of the Supreme Court of the State of New York, Second Department, annulled the determination of the Board and directed the Board to issue an extension of the requested permits "for one year beginning from the date of entry of [the] order (December 26, 1972)." (A15)* The judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division was entered on May 3, 1973. (A34-A37)

The petition for writ of certiorari was filed on August 17, 1973, more than 90 days since the entry of judgment by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U. S. C. Title 28, § 2101(c) and Rule 22 of this Court).

2. Petitioners contend that the period of 90 days within which a petition pursuant to 28 U. S. C. § 2101(c) shall be filed is to be computed not from May 3, 1973—the date of entry of the judgment of the Court of Appeals—but rather from May 25, 1973—the date of entry of an order of the Appellate Division which amended, in one minor and non-substantial respect, its prior order of December 26, 1972. Petitioners' contention is erroneous.

The May 25, 1973 order of the Appellate Division directed the Board to issue the requisite permits to Lefrak "for a term of one year from May 7, 1973", the date of filing of the remittitur of the Court of Appeals. (A49-A50) Thus, the Appellate Division's order of May 25, 1973 did no more than to grant Lefrak that which was originally

*References are to Petitioners' Appendix.

intended by its order of December 26, 1972—the issuance of building permits for a term of one year. In situations where a lower court judgment has been amended or modified, the test to be applied to determine whether the filing of a petition for a writ of certiorari is timely has been aptly stated by this Court in *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952):

> "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." 344 U. S. at 212.

The rights of the various parties to the above entitled action were fully and finally adjudicated in the Court of Appeals judgment of May 3, 1973. The modification by the Appellate Division of May 25, 1973, which merely restored to Lefrak that portion of the one-year extension which was consumed by the appeal to the Court of Appeals, did not alter the substance of the Court of Appeals judgment, nor did it in any way affect the portions of that judgment which are now sought to be reviewed. Petitioners' own conduct underscores this conclusion since they neither appealed from nor in any way sought review of the order of May 25, 1973, and thus waived their right to do so.

Petitioners' failure to file their petition for a writ of certiorari within the prescribed time period is a jurisdictional defect which cannot be cured. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). In any event, the petition does not warrant review by this Court, because, among other things, (a) it relates solely to New York practice; (b) it relies almost exclusively on the particular and peculiar facts of the given case which are unlikely to occur again; and (c) the judgment below is correct on the facts and on the merits.

CONCLUSION

For the above reasons, Petitioners' application for a writ of certiorari is untimely and without merit and should be denied.

Respectfully submitted,

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Dated: New York, New York
September 17, 1973